

International Arbitration



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The next edition of Migalhas on International Arbitration will be published in the summer of 2010.

INTERNATIONAL ARBITRATION EXPRESS

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Edited by Mauricio Gomm-Santos and Quinn Smith

Migalhas on International Arbitration

In this third issue of Migalhas on International Arbitration, we continue to dig in to an array of interesting legal issues from around the world.

First, Daniel Gonzalez and Maria Ramirez of Hogan Hartson in Miami, Florida, give a practical series of steps to enforcing foreign arbitral awards within the United States. The article comes in two parts, both of which provide a complete picture of the issue.

Second, Annmarie Grosshans from Schorndorf, Germany, gives readers an overview of interim measures under German law. The topic is a strong foundation in the legal underpinnings supporting the arbitral process.

Finally, Aliaksandr Danilevich from Minsk, Belarus, reviews the process for enforcing foreign arbitral awards in Belarus. His practical insights reveal a stable legal regime regarding the recognition and enforcement of foreign arbitral awards, including the use of the UNCITRAL Model Law on International Commercial Arbitration.

After three issues, hopefully Migalheiros have gained a broader appreciation for a number of timely topics while thinking of ideas of their own. As we grow, make sure to keep in touch and let us know the latest changes in your home country. In the next issues, we will continue our global survey of arbitration law, relying on our readers to keep it going.

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International Commercial Arbitration: Hurdles when Confirming a Foreign Arbitral Award in the United States³

By Daniel E. González⁴ and María Eugenia Ramírez⁵

Over recent years, international commercial arbitration has gained worldwide acceptance as one of the preferred means of international dispute resolution. One of the primary reasons for the prevalence of arbitration is the expectation that the awards issued by an international arbitral tribunal will receive worldwide recognition by countries that are members of one of the international conventions on the enforcement of arbitral awards. Yet, a growing number of parties face various procedural and substantive hurdles and obstacles when attempting to enforce an arbitral award rendered in their favor. Viewed from the context of a confirmation proceeding in the United States of America, this article will provide a practical approach on how to avoid and overcome the hurdles to confirming a foreign arbitral award that will apply in any jurisdiction worldwide.⁶

A. Statute of Limitations

In the United States, arbitral award confirmation petitions are governed by the Federal Arbitration Act (“FAA”).⁷ The FAA provides a three year statute of limitations for the filing of arbitral award confirmation petitions. Specifically, the FAA provides that “[w]ithin three years after an arbitral award falling under the Convention⁸ is made, any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as against any other party to the arbitration.” 9 U.S.C. §§ 207, 302. Therefore, a party seeking the confirmation of a foreign arbitral award in the United States must

comply with this requirement to avoid having its enforcement petition dismissed for being time-barred.

B. Subject Matter Jurisdiction

Parties seeking to enforce a foreign arbitral award must also ensure that the federal court has subject matter jurisdiction over the enforcement proceedings. This, however, can be established through 28 U.S.C. § 1331. This is because United States federal district courts have original subject matter jurisdiction over arbitral award confirmation proceedings pursuant to the federal question jurisdiction statute given that this type of proceeding is a civil action arising under the laws and treaties of the United States, specifically 9 U.S.C. § 203 (the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958) (the “New York Convention”) and 9 U.S.C. §§ 203, 302 (the Inter-American Convention on International Commercial Arbitration, Panama City, Panama, January 30, 1975) (the “Inter-American Convention”). See 28 U.S.C. § 1331.

C. Personal Jurisdiction

Another hurdle that a party seeking to enforce a foreign arbitral award must overcome is that of personal jurisdiction. In the United States, the federal district court where the enforcement petition has been filed must have personal jurisdiction over the respondent. In the United States, a federal court may exercise personal jurisdiction in any of two ways: specific personal jurisdiction and/or general personal jurisdiction. The exercise of specific personal jurisdiction is appropriate when the nature of the arbitrated issues arises “out of or [are] related to [respondent’s] contacts with the forum.” *SEC v. Carillo*, 115 F.3d 1540, 1542 n. 2 (11th Cir. 1997), citing *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 414 n.8, 104 S.Ct. 1868, 1872 n.8, 80 L.Ed.2d 404 (1984). General personal jurisdiction is appropriate when the respondent has contacts with the United States, but the suit does

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“not aris[e] out of or is related to [respondent’s] contacts with the forum.” Carillo, 115 F.3d at 1542 n.2.

Federal courts have “widely adopted” a test for the sufficiency of minimum contacts in order to exercise personal jurisdiction over a respondent. See Fed. R. Civ. P. 4(k)(2). The factors identified as part of this test are the following: (i) whether the respondent transacts business in the United States; or (ii) whether the respondent is doing an act in the United States; or (iii) whether the respondent’s actions done elsewhere have an effect in the United States.⁹

Based on the above, when a party is seeking to enforce a foreign arbitral award in the United States, it must confirm that the respondent has minimum contacts with the United States so that the federal court does not dismiss the enforcement petition for lack of personal jurisdiction over the respondent.¹⁰

D. Venue

Venue refers to the place within a jurisdiction in which a particular action is to be brought. It becomes a consideration once jurisdiction over the parties has been established. Although venue will not be discussed in detail in this article, it is also a requirement that needs to be met by the party seeking confirmation of a foreign arbitral award in the United States. Venue in federal district court cases is controlled by the general federal venue statute.¹¹

E. Service of Process

In line with its policy of effectuating the speedy resolution of disputes, the FAA provides that confirmation of arbitral awards are intended to be summary in nature, and should be initiated through federal motion practice.¹² The court’s function in confirming an arbitral award is therefore limited, “since if it were otherwise, the ostensible purpose for resort to arbitration, i.e., avoidance of litigation, would be frustrated.”¹³

The Eleventh Circuit in the Booth decision described the summary procedure for the confirmation of an arbitral award under the FAA as follows:

“A party initiates judicial review of an arbitration award not by filing a complaint in the district court, but rather by filing either a petition to confirm the award or a motion to vacate or

modify the award. See 9 U.S.C. § 9 (explaining procedure for making petition to confirm the award); § 12 (explaining procedure for making motion to vacate, modify, or correct an award); § 6 (providing that any application to the court under the Act should be made in the form of a motion). These rules further the [FAA’s] policy of expedited judicial action because they prevent a party who has lost in the arbitration process from filing a new suit in federal court and forcing relitigation of the issues ... Moreover, the district court need not conduct a full hearing on a motion to vacate or confirm; such motions may be decided on the papers without oral testimony.”

Booth, 902 F.2d at 932 (internal citations omitted).

Notwithstanding the FAA’s policy of effectuating the speedy resolution of disputes and that arbitral award confirmation proceedings in the United States are intended to be summary in nature, a party seeking enforcement of a foreign arbitral award must review the FAA, as well as the New York and Inter-American Conventions,¹⁴ when determining how to effectively serve a petition to confirm an arbitral award.

Specifically, the FAA at 9 U.S.C. § 9 governs service of an arbitral award confirmation petition in ordinary circumstances, that is, on a domestic respondent. See 9 U.S.C. § 9. The statute, however, provides no guidance as to how to serve an extraterritorial respondent. The New York Convention and Inter-American Convention are also silent with respect to the proper manner of effecting service of the confirmation petition on an extraterritorial respondent.

Accordingly, we are left with only United States jurisprudence for the answer. Although service of process of a foreign arbitral award enforcement petition is a topic that has been addressed by only a handful of federal courts in the United States, the few courts that have reviewed service of process of a confirmation petition on an extraterritorial respondent agree that a party seeking such a confirmation in the United States must serve the petition pursuant to Rule 4 of the Federal Rules of Civil Procedure.¹⁵ In turn, a party wishing to confirm an arbitral award in the United States must review Rule 4 of the Federal Rules of Civil Procedure in order to determine the best manner in which to serve the confirmation petition to ensure that the United

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States court does not dismiss its enforcement petition for insufficient service of process.

For instance, if the respondent is a citizen of a foreign state, then the party seeking enforcement in the United States must review Rules 4(f) and 4(h) of the Federal Rules of Civil Procedure to determine the best manner to effectuate service on the extraterritorial respondent. Key factors to consider in such an analysis will be (i) whether the applicable foreign law requires that such a petition be served through the issuance of a summons, (ii) whether the applicable foreign law identifies the individuals who are authorized to receive service of process on behalf of the foreign corporation in the foreign country, and (iii) whether the applicable foreign law allows for such an enforcement petition to be served via mail, via certified mail requiring a signed receipt, or via Federal Express. See Fed. R. Civ. P. 4(f).

Editors' Note: González and Ramírez continue their analysis of confirming an arbitral award in the United States in Issue 4. Be sure to check the next issue for their practical tips on avoiding problems with service of process and confirmation of the award.

The Availability of Interim Measures in Arbitral Proceedings under German Law

By Annemarie Grosshans¹⁶

Modern global business affairs need to be handled in an efficient, flexible manner and in time. Upcoming problems have to be resolved without causing undue delay, since any delay would cause costs to one or both of the parties or even to a third party. The economic damage could rise to unforeseeable, unplanned and – in the worst case – to unrecoverable amounts. All this claims for effective legal means of dispute resolution. No doubt, efficient legal protection in arbitral proceedings is not conceivable without the availability of interim measures to protect assets, claims and any other interest to be protected preliminarily. The availability of interim measures of protection in the arbitration law mirrors the quality and effectiveness to be expected in case of a dispute resolution process.

In Germany, the arbitration law is embodied in the Code of Civil Procedure (Zivilprozessordnung or ZPO), which provides for both interim measures by the court and by the arbitral tribunal. Both of them are of the same rank. The wording of the legal text itself gives the best overview on the competences of each of them.

Section 1033 of the ZPO deals with arbitration agreements and interim measures by court: “It is not incompatible with an arbitration agreement for a court to grant, before or during arbitral proceedings, an interim measure of protection relating to the subject-matter of the arbitration upon request of a party.”

Section 1041 of the ZPO provides for interim measures of protection by the arbitral tribunal:

(1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order such interim measures of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute. The arbitral tribunal may require any party to provide appropriate security in connection with such measure.

(2) The court may, at the request of a party, permit enforcement of a measure referred to in subsection 1, unless application for a corresponding interim measure has already been made to a court. It may recast such an order if necessary for the purpose of enforcing the measure.

(3) The court may, upon request, repeal or amend the decision referred to in subsection 2.

(4) If a measure ordered under subsection 1 proves to have been unjustified from the outset, the party which obtained its enforcement is obliged to compensate the other party for damage resulting from the enforcement of such measure or from its providing security in order to avoid enforcement. This claim may be put forward in the pending arbitral proceedings.”

Section 1033 of the ZPO clarifies that an arbitration clause does not hinder a party to apply for interim measures by court, even if arbitral proceedings already have been started. The international competence of the court has to be given. The seat of the arbitration in Germany does not automatically establish the international competence of the court for interim measures (the arbitration clause is no derogation clause), and on the other hand

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the competence could be given although the arbitral proceedings are abroad. German courts, however, lack international competence to issue orders in respect of the independent taking of evidence, if the parties, by agreement, have submitted disputes to a foreign arbitral tribunal pursuant to – also in procedural aspects – foreign law.¹⁷ The independent taking of evidence by a court pursuant to sections 485 et seq. of the ZPO is an ancillary procedure, which is according to principles of German procedural law not admissible, if it cannot be used in the main proceeding to which it is functionally linked because that main proceeding cannot take place in Germany.

As the parties are free to determine the procedure of the arbitration themselves they can agree to an exclusive competence of the arbitral tribunal for interim measures. Such an agreement has to be expressive since an arbitration agreement itself never excludes the competence of the court for interim measures.

Interim measures by court have the advantage that they are enforceable without any further steps to be taken, whereas the enforcement of interim measures of protection by the arbitral tribunal has to be permitted by the court. The ZPO provides for the interim measures the court may grant (arrest, injunction). The arbitral tribunal is more flexible since it may order such interim measures of protection it considers necessary. The possibility provided for in section 1041(2) of the ZPO to recast an interim measure granted by the arbitral tribunal does not include the power to take fundamental changes to the measures. It only admits changes to the wording to the end of rendering the measure sufficiently precise for the purpose of enforceability. Any changes in substance require a request by the party to that effect as well as a change in the factual circumstances.¹⁸

As interim measures by court and such by arbitral tribunals are of the same rank, the arbitral tribunal may consequently also grant an interim measure ex-parte without hearing the opposing party.

However, the arbitral tribunal cannot be obliged to grant an interim measure, even if legal grounds were given since the legal wording in section 1041 (1) of the ZPO reads “may grant”. This could become a serious problem only, if the parties had agreed to the exclusion of interim measures by court. Otherwise, the party

can call the court for an interim measure under section 1033 of the ZPO.

Enforcement of foreign arbitral awards in Belarus

By Dr. Aliaksandr Danilevich¹⁹

Belarus is a signatory of the Convention on Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the “New York Convention”). In Belarus’ internal legislation, questions of recognition and enforcement of foreign international arbitral awards are regulated by article 45 of the Law of Belarus from 09.07.1999, No 279-Z “On the international arbitration court (tribunal)”²⁰ Article 45 states the “awards of the foreign international arbitration court, independent of the foreign state where they have been rendered, are recognized and enforced in accordance with the commercial, procedural legislation of Belarus and its international treaties. The Belarus arbitration law is based on the UNCITRAL Model Law on International Commercial Arbitration of 1985.

Article 246 of the Code of Commercial Procedure (hereafter the “CCP”) governs the application for recognition and enforcement of a foreign arbitral award. The creditor must file the application in commercial court²¹ in the location or residence of the debtor. If the debtor’s location or residence are unknown, the application can be filed where the debtor’s property is located.

The creditor should submit its application for the recognition and enforcement of the foreign arbitral award in writing and signed by the creditor or its representative. The specified documents are admitted when their legalization is properly certified with an apostille or Consular Legalization, whichever is in accordance with the international treaties of Belarus. The creditor must also supply a document confirming payment of a State Tax for such applications (on January 3, 2010, the sum is equivalent to approximately 120 USD). The commercial court returns the application to the creditor without consideration in case of non-observance of requirements established by CCP.

The list of documents attached to the application in Belarus is a little expanded in comparison with the requirements,

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established in article 4(1) of the New York Convention. However, this expansion is rather slight and represents only acknowledgement of the performance of some formalities, which does not contradict at all the requirements fixed in the New York Convention.

Applications for a recognition and enforcement of the foreign arbitral award are considered in judicial session by the judge of the commercial court in no more than one month from the date of their receipt. The commercial court informs the parties of the time and place of hearings. Absence of the specified persons properly noticed at hearings does not interfere with a legal investigation.

At a legal investigation, the commercial court in judicial session establishes the presence or absence of the grounds for a recognition and enforcement of the foreign arbitral award by research of proofs of the substantiation of the above requirements and the objections presented to the commercial court.²² The commercial court has no right to revise the foreign arbitral award on the matter.²³

After considering the application for the recognition and enforcement of the foreign arbitral award, the commercial court renders a partial decision. Such decision should contain the instructions to recognize and enforce the foreign arbitral award or the court's refusal to do so.

According to Article 238, CCP, the commercial court can refuse the recognition and enforcement of a foreign arbitral award if execution would contradict a public policy of Belarus otherwise provided by the international treaties of Belarus. The international treaties regulating questions of a recognition and enforcement of foreign arbitral awards are the New York Convention and the European convention of 1961 on International Commercial Arbitration (article IX (2)). But the public policy grounds are limited because Belarusian legislation has linked these grounds to the norms of Article V of the New York Convention, providing the exhaustive list of grounds for refusal and enforcement of foreign arbitral awards.

The partial decision of the commercial court on the recognition and enforcement of the foreign arbitral award comes into effect immediately and can be appealed to the Court of

Cassation and Supervising Instance in an order established according to chapters 32 and 33, CCP.

The process for executing an arbitral award is also quite simple. According to Article 250, CCP, compulsory execution of the foreign arbitral award is made on the basis of the executive document (order) which is given by the commercial court. Once the commercial court renders a partial decision on the recognition and enforcement of the foreign arbitral award, execution can proceed with in an order provided according to the norms of section IV "Executive Proceedings" of CCP. The foreign arbitral award can be the object of compulsory execution in time not exceeding three years from the date of its entering in force, which is the day the tribunal rendered the award. Do not confuse this day with the date when a partial decision of the commercial court on the recognition and enforcement of the foreign arbitral award enters into force. In case of the delay, the specified term can be restored by the commercial court under the petition of the creditor by the rules provided by CCP.

Belarus has a simple, modern, and fast method of enforcing foreign arbitral awards. Through application to the commercial court, a creditor has a strong chance of enforcing a properly rendered award. Although facts and circumstances may vary, foreign companies should have little to fear when choosing to enforce an arbitral award in Belarus. A foreign in-house counsel can represent its company in the procedure of enforcement, but not foreign attorneys because it is only a local licensed lawyers' job. In addition, the official languages for proceedings in Belarus are Belarusian or Russian.

WATCH FOR INTERNATIONAL ARBITRATION EXPRESS

Breaking developments in International Arbitration will be frequently published in the new column of the Migalhas International newsletter.

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References

3 Please note this article has also been published in The Florida Bar Journal (The Florida Bar); International Arbitration Law Review (Thomson Reuters); and Transnational Dispute Management, Vol. 6, Issue 4.

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6 In the United States, foreign arbitral awards are those not necessarily issued in a foreign jurisdiction, but simply those made "within the legal framework of another country, e.g., pronounced in accordance with foreign law or involving parties domiciled or having their principal place of business outside the enforcing jurisdiction." *Bergesen v. Joseph Muller Corp.*, 710 F.2d 928, 932 (2nd Cir. 1983).

7 9 U.S.C. § 1 et seq.

8 The "Convention" refers to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, as well as to the Inter-American Convention on International Commercial Arbitration, Panama City, Panama, dated January 30, 1975. Please visit and <http://www.wipo.int/amc/en/arbitration/ny-convention/parties.html> and http://www.sicc.oas.org/dispute/comarb/intl_conv/caicpac.asp for a current list of signatories to each convention.

9 See *Western Equities, Ltd. v. Hanseatic, Ltd.*, 956 F. Supp. 1232, 1237 (D.V.I. 1997) and authorities cited therein.

10 A federal court may also exercise quasi in rem jurisdiction over any assets that the respondent has in the United States. Federal law holds that District Courts may exercise quasi in rem jurisdiction in order to enforce judgments against property to "collect a debt based on a claim already adjudicated in a forum where there was personal jurisdiction over the defendant."

Frontera Resources Azerbaijan Corp. v. State Oil Co. of Azerbaijan, 479 F.Supp.2d 376, 387 S.D.N.Y. (2007), citing *R.F. Shaffer v. Heitner*, 433 U.S. 186, 210 n.36, 97 S.Ct. 2569, 53 L.Ed.2d 683 (1977).

11 See 28 U.S.C. § 1391; see also 9 U.S.C. §§ 204, 302.

12 See 9 U.S.C. § 1, et seq.; *Booth v. Hume Pub., Inc.*, 902 F.2d 925, 931-33 (11th Cir. 1990).

13 See *Booth*, 902 F.2d at 932.

14 Both the New York Convention and the Inter-American Convention are enforceable in the United States through the FAA. See 9 U.S.C. §§ 201, 301.

15 See, e.g., *In the Matter of Arbitration between Marine Trading Ltd. v. Naviera Comercial Naylamp, S.A.*, 879 F. Supp. 389, 391-392 (S.D.N.Y. 1995).

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17 See Decision of the Higher Regional Court of Duesseldorf of February 7, 2008 – I-20 W 152/07.

18 See Decision of the Higher Regional Court of Saarbruecken of February 27, 2007 – 4 Sch 01/07.

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20 National Registry of Legal Acts of Republic of Belarus, 30.07.1999, N 56, 2/60.

21 There are "general" courts for civil and penal cases and "commercial" or "economic" for all commercial cases in Belarus.

22 Article 247, CCP.

23 Article 247(1), CCP.

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